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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No.

PAUL D. GUTWEIN and State of Maryland Commission on Human Relations, *Petitioners*

v.

EASTON PUBLISHING CO., *Respondent*

To the Court of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland in this case.

OPINIONS BELOW

The decision of the Petitioner Commission was not reported and is reproduced in App. A, *infra*. The opinion of the Circuit Court for Talbot County, Maryland was not reported and is reproduced in App. B, *infra*. The decision of the Court of Appeals of Maryland (App. C, *infra*) is reported at—Md.—, 325, A.2d 740, 8 EPD ¶ 9728 (1974).

JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on October 8, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether a state may constitutionally apply its civil rights law enacted under a joint federal-state scheme in a manner which denies constitutional remedies to an acknowledged victim of racially discriminatory employment practices?

STATUTORY AND CONSTITUTIONAL PROVISIONS

The statutory provisions involved are the Maryland Fair Employment Practices Act, Art. 49B, Md. Code Ann. §§ 17 *et seq.* (1957, 1974 Supp.) and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e (1970) as amended by the Equal Opportunity Act of 1972, 86 Stat. 103 (1972). They are set forth in App. E and F, *infra*.

The constitutional provisions involved are the Supremacy Clause, Article VI, Cl. 2, and the Fourteenth Amendment, Sec. 1, to the United States Constitution. They are set forth in App. G, *infra*.

STATEMENT

The Easton Publishing Company (Easton) operates a weekly newspaper, the *Easton Star-Democrat*, which is located on the eastern shore of Maryland in the city of Easton in Talbot County. In the summer of 1969, Easton employed as a reporter-editor Paul D. Gutwein, a White male then single and 28 years old. At the time Gutwein was hired to work at the newspaper, he was engaged to be married and had related this

fact to Easton prior to his employment. The fact that Gutwein's fiancee was a Black woman was not known by Easton at the time Gutwein was hired.

On Sunday, August 10, 1969, one week after Gutwein started work at the newspaper, he became involved in a dispute with his landlord concerning his Black fiancee. Gutwein immediately related the incident to his employer and he was assured his fiancee's race would not be a factor in his employment. However, the next day Gutwein was told by Easton that he would be discharged because his fiancee's race would interfere with his effectiveness as a reporter on Maryland's eastern shore. Gutwein remained at the newspaper until August 21, 1969. Afterwards he was unemployed for a period of eight weeks; however, he received two weeks severance pay. He also incurred fifty dollars in moving expenses connected with his discharge from Easton. Gutwein later secured employment in Washington, D. C. and married his fiancee.

Meanwhile Gutwein filed a complaint on August 20, 1969 with the State of Maryland Commission on Human Relations (Commission) charging Easton with racial discrimination in connection with his discharge. (App. H, *infra*). The case proceeded through the statutory administrative process: an investigation was conducted, probable cause was found to credit Gutwein charges, conciliation failed and an evidentiary public hearing was conducted in Talbot County on December 11, 1972.

After the hearing the Commission issued its decision on March 8, 1973. The Commission found that Gutwein was discharged because of his fiancee's race and therefore he was the victim of a racially discriminatory employment practice. Easton was ordered to pay

Gutwein back pay in the amount of $557.16 and $50.00 in moving expenses. (App. A, *infra.*)

Subsequently, Easton appealed the Commission's decision to the Circuit Court for Talbot County, Maryland. Easton challenged both Gutwein's rights under the state civil rights law and the Commission's remedy of awarding back pay and moving expenses. In response, the petitioners raised constitutional issues regarding Maryland's duty to adequately remedy racially discriminatory employment practices. The circuit court agreed with the Commission's finding that Gutwein's discharge occurred because of his employer's discovery that his fiancee was Black. Nevertheless, the circuit court reversed the Commission's decision holding that Gutwein possessed no civil rights which were violated. (App. B, *infra*).

Thereafter Gutwein and the Commission appealed to the Court of Appeals of Maryland. Petitioners again raised constitutional issues before the Court of Appeals. (App. D, *infra*). On October 8, 1974, the Court of Appeal reversed the judgment of the circuit court holding that state law did indeed give Gutwein a civil right by which to complain against a racially discriminatory employment practice and that Easton's conduct offended Gutwein's civil rights under state law. Nevertheless, the Court of Appeals interpreted the remedial provisions of the state civil rights law as not contemplating relief to deal with the effects of discrimination. (App. C. *infra.*) Consequently, the Commission order of relief for Gutwein was vacated and Gutwein was left in possession of a civil right but without a remedy for the violation of that right.

A motion for reargument was denied by the Court of Appeals of Maryland on November 6, 1974.

REASONS FOR GRANTING THE WRIT

The Constitution Requires a State To Provide Remedies to Victims of Racially Discriminatory Employment Practices Which Are Adequate and Eliminate the Effects of Discrimination

The Maryland Fair Employment Practices (FEP) law, Art. 49B, Md. Code Ann. §§ 17 *et seq.* (1974 Supp.) was enacted in 1965 under the umbrella of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e (1970), so that Maryland could participate in the joint federal-state civil rights enforcement contemplated by Congress. Several factors ilustrate this principle.

The Maryland FEP law created new civil rights, the opportunity to secure and maintain employment free from racially discriminatory treatment. The provisions of the Maryland FEP law creating these new substantive rights are identical to those contained in Title VII (*compare,* App. E-Sec. 19 with App. F-Sec. 703), a factor acknowledged by the Court of Appeals of Maryland (App. C, *infra,* p. 11a). In effect, when Maryland adopted its FEP law, it adopted federal law as its own. Maryland has continued to follow federal law by also adopting the recent changes to Title VII, *see,* Chap. 493, Laws of Md. 1973.

Title VII itself provides a scheme for joint federal-state participation in civil rights law enforcement, 42 U.S.C. 2000e-5 (1970). Under Title VII states may be certified as deferral agencies to received complaints filed under the federal scheme. The subsequent work product of the state is required to be given substantial weight. The Maryland Commission has operated as a deferral agency since 1966. Of course state participation under Title VII's federal-state scheme presupposes that the state law accords rights and remedies to victims of discrimination which are in conformity with federal law.

Under this procedure several thousand persons have been encouraged to seek relief directly from the Maryland Commission and by passing the procedure under federal law believing that federal and state civil rights and remedies were identical. The decision of the Court of Appeals of Maryland leaves these persons without any opportunity to vindicate possible abuse of their civil rights.

The decision of the Court of Appeal of Maryland recognizes the existence of state civil rights identical to federal law. The decision also acknowledged that the civil rights of Petitioner Gutwein were violated. Inexplicably, however, Petitioner Gutwein was denied a remedy, the Maryland court holding that the *effects* of a racially discriminatory employment practice could not be remedied under Maryland law. The state court specifically ruled that back pay could not be awarded a victim of racial discrimination. This decision, for reasons stated below, unconstitutionally sanctions a racially discriminatory employment practice.

1. Abdication of a constitutional duty

The Maryland court's decision has avoided a duty under the Equal Protection clause of the Fourteenth Amendment of the U.S. Constitution to eliminate discrimination when it is discovered. It is firmly established that state civil rights agencies and state courts are under a constitutional obligation to enforce the same rights and provide the same remedies in the civil rights field as are available in federal courts, *Sullivan* v. *Little Hunting Park*, 396 U.S. 229 (1968); *State of Minnesota* v. *Bergeron*, 290 Minn. 351, 187 N.W. 2d 680 (1971); *Gilliam* v. *City of Omaha*, 331 F. Supp. 4 (D. Neb. 1971), rev'd on other grounds, 459 F. 2d 63

(8th Cir. 1972); see also, *Betts* v. *Easley*, 161 Kan. 459, 169 P. 2d 831 (1946). Both federal and state civil rights laws are based upon constitutional principles and merely provide differing mechanisms to vindicate constitutionally protected rights. In effect, a person invoking a state civil rights law substantially equivalent to federal law is also invoking these constitutionally protected rights. Enforcement of these state laws includes a duty to provide constitutional remedies. *State of Minnesota* v. *Bergeron, supra; see Louisiana* v. *United States*, 380 U.S. 145, 154 (1965).

With respect to the instant case, the Maryland court's failure to acknowledge a remedy for the discriminatory practices of the Respondent amounts to unconstitutional state action. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961). This Court stated in Burton that "no state may effectively abdicate its responsibilities by either ignoring them by merely failing to discharge them . . ." Id. at 725. By not acting to provide a remedy against the Respondent's practices, Maryland became a joint participant in the illegal discrimination by permitting it to continue without sanction. *Evans* v. *Newton*, 382 U.S. 296 (1966); *Shelley* v. *Kraemer*, 334 U.S. 1 (1948); *State of Minnesota* v. *Bergeron, supra; Jenkins* v. *United Gas Corp.*, 400 F. 2d 28, 34 (5th Cir. 1968); *see also, Potts* v. *Flax*, 313 F. 2d 284, 289 (5th Cir. 1953).

The remedy of damages has long been recognized as a constitutional requisite to vindicate those whose civil rights have been violated. *Sullivan* v. *Little Hunting Park, supra; McCabe* v. *Atchison T & S.F.R. Co.*, 235 U.S. 151 (1914); *see also, Solomon* v. *Pennsylvania Railroad Co.*, 96 F. Supp. 709 S.D.N.Y. 1951). Such damages have also been applied under state laws.

Williams v. *Joyce*, 4 Ore. App. 482, 479 P. 2d 513 (1971); *Gray* v. *Serruto Builders, Inc.*, 110 N.J. Super. 297, 265 A. 2d 404 (1970); *Randall* v. *Cowlitz Amusements, Inc.*, 194 Wash. 82, 76 P. 2d 1017 (1938); *Bibb* v. *Alton*, 209 Ill. 461, 70 N.E. 640 (1904).

Back pay as a remedy for employment discrimination is a specific application of these general principles. Indeed, back pay has been held a constitutional remedy as well as a remedy necessarily implied from statutes creating civil rights. *See, Young* v. *International Tel. & Tel. Co.*, 438 F. 2d 757 (3rd Cir. 1971); *Sanders* v. *Dobbs Houses, Inc.*, 431 F. 2d 1097 (5th Cir. 1970), *cert. denied* 401 U.S. 948 (1971); *Smith* v. *Hampton Training School for Nurses*, 360 F. 2d 577 (4th Cir. 1966); *Harkless* v. *Sweeny Independent School Dist.*, 427 F. 2d 319 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971). Under Title VII, back pay has become a mandatory remedy to effectuate the elimination of discriminatory employment practice. *Moody* v. *Albermarle Paper Co.*, 474 F. 2d 134 (4th Cir. 1973), *cert. granted*, 43 U.S.L. Week 3344 (U.S. Dec. 17, 1974) (No. 74-389); *Pettway* v. *American Cast Iron Pipe Company*, 494 F. 2d 211 (5th Cir. 1974).

After finding discriminatory employment practice which operated against Petitioner Gutwein, the Commission proceeded to fashion relief to eliminate the effects of such practice. (App. A, *infra*, pp. 3a). This specific relief was necessary to vindicate Gutwein's rights since any future employment with Easton would be unlikely.

Had Gutwein not been encouraged by Maryland law to seek vindication of his civil rights through state law, he quite likely would have obtained adequate relief directly under federal law. The Maryland court's in-

terpretation of its state civil rights law as providing only rights identical to federal law but not remedies, clearly denies to Gutwein and all those persons similarly situated equal protection under the law. The Maryland court's action denies to Gutwein necessary constitutional relief to which he and the public are entitled. Failure to grant this constitutional relief renders the Maryland FEP law a sham and amounts to unconstitutional sanction of discriminatory practices.

2. Supreme law of the land

State courts cannot directly refuse to enforce a federal law and should not be allowed to do so indirectly. In *Testa* v. *Katt*, 330 U.S. 386 (1974), this Court ruled that a state court's refusal to apply federal standards was in violation of Article VI, Section 2, of the U.S. Constitution which binds state judges to the "supreme law of the land."

This Court has already had occasion to review the attempt of a state court to evade the enforcement of a federal civil rights law. *Sullivan* v. *Little Hunting Park, supra.* The Virginia Supreme Court of Appeals used a discretionary state procedural rule to block an appeal in a housing discrimination case based on § 1982, Civil Rights Act of 1866. In applying the supremacy doctrine this Court overruled the state judges' decision that no jurisdiction existed and further ruled that the measure of damages must be in accord with federal law.

Gutwein, like Sullivan, invoked a civil rights statute. However, Gutwein relied on the state fair employment law as being equivalent to the federal law protecting him from discriminatory employment practices. The Maryland Court of Appeals, as had the Virginia

court in *Sullivan*, exercised its discretion and found the state law lacking sufficient specificity to allow money awards by the enforcement agency. This decision, in effect, means that the state legislature intended to lay a trap for unwary Maryland citizens who would forego pursuing their federal rights because they were encouraged to utilize a state agency. While the Maryland law is not a carbon copy of the federal law (being much less detailed in all sections) the background of how and when it was passed indicates that the state legislature made the choice to participate in a joint federal-state enforcement scheme. As a result, the Maryland court should not be allowed to emasculate the substantive rights protected by denying any meaningful remedy. *State of Minnesota* v. *Bergeron, supra; Gilliam* v. *City of Omaha, supra.*

When Title VII was enacted, a cornerstone of the Act included a provision for local enforcement by state civil rights agencies, Congress believing this approach to be the most effective means of eliminating discrimination. This procedure is effectuated by means of statutory deferral provisions which were reviewed by the U.S. Supreme Court on two occasions. *Love* v. *Pullman*, 404 U.S. 522 (1972); *Crosslin* v. *Mountain States Tel. & Tel. Co.*, 400 U.S. 1004 (1971). Under *Crosslin*, a state interest under Title VII cannot be ignored. That Congress intended that state agencies are to be an integral part of Title VII enforcement is further buttressed by the *Equal Opportunity Act of 1972*, which requires that the result of enforcement under state laws is to be given substantial weight by federal government. See. Section 706(b) of Title VII, as amended March 24, 1972, P.L. 92-226, Sec. 4.

While the state agencies involved in the *Love* and *Crosslin* cases were expressly limited to conciliation, the Maryland administrative agency was clearly designed as an enforcement agency. However, cease and desist powers without the accompanying affirmative powers, including compensatory relief, are meaningless, and water down effective enforcement of federal law. The Maryland court has abused its discretion in interpreting the state statute as not providing enforcement powers thus inferring that the legislature meant to create a right but no remedy. This abuse of discretion under the facts of the instant case constitutes a disregard of the supremacy clause.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari to the Court of Appeals of Maryland should be granted.

Respectfully submitted,

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